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No. 95-1602

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

STATE OF IDAHO,

Petitioner,

v.

GENE FRANCIS STUART,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The respondent, Gene Francis Stuart, respecfully prays that the Petition for Writ of Certiorari filed by petitioners to review the Opinion of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decision delivered in the proceedings below except the petition fails to recognize on the first page the above-entitled matter is a capital case.

STATEMENT OF THE CASE

In October of 1982, GENE FRANCIS STUART was convicted of violating § 18-4001 of the Idaho Code. (Murder in the first degree.) The conviction and concomitant death sentence was appealed to the Idaho Supreme Court. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985), (hereinafter *"Stuart I"*). The State's recapitulation of the facts stated in *Stuart I* in the Petition for Writ of Certiorari is correct only in-so-far as it goes. However, it is incorrect in its glaring absence of the number of issues which were raised in *Stuart I*. Those issues were as follows:

1. Was there sufficient evidence to warrant a jury to convict on a first degree murder by torture charge? *Stuart I*, 110 Idaho at 167, 715 P.2d at 37.

2. Should the jury have been instructed as to the lesser included offense of second degree murder by torture? *Stuart I*, 110 Idaho at 169, 715 P.2d at 39.

3. Was there error in the denial of defendant's/Mr. Stuart's motion in limine seeking to forbid introduction of evidence concerning Stuart's relationships with former wives and girlfriends?

4. Was there error in the venue chosen for trial? *Stuart I*, 110 Idaho at 172, 715 P.2d at 842.

5. Was there error in the fact that defendant/Mr. Stuart was incarcerated for a year prior to a trial and deprived of a speedy trial? *Stuart I*, 110 Idaho at 173, 715 P.2d at 843.

Finally, Stuart raised issues regarding the aggravating circumstances relied upon by the trial court in rendering the death penalty and jury non-participation in the sentencing process. *Stuart I*, 110 Idaho at 174, 715 P.2d at 833.

The State of Idaho in its brief in support of the petition makes much of the proportionality review and quotes the most egregious language available regarding actions allegedly taken by Mr. Stuart. The State's selection of "facts" is extremely ironic because it is exactly those facts which would not be in the State's possession absent the surreptitious tape recording and/or monitoring of attorney-client communications by law enforcement officials at issue.

The statement of facts by the State in reference to the proportionality review are nothing but a thinly disguised

attempt to color consideration of legal issues by attempting to paint Mr. Stuart as a very bad man who deserves to die. The State is fully aware that much of the "proportionality" facts used by the sentencing court were hearsay, were not subject to cross examination, and further were obtained by the State as a result of the surreptitious recording and/or monitoring of conversations between Mr. Stuart and his attorneys. Those facts obviously were used by the trial court as a major consideration in a nonmitigation finding and sentencing Mr. Stuart to death. Many of the same facts gleaned from the testimony of girlfriends was also used by the State to establish intent and/or some sort of sadistic inclination on the part of Mr. Stuart.

The second Stuart case, *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990) (*Stuart II*) was a post-conviction proceeding and involved: 1) issues surrounding the use of a preliminary hearing transcript at sentencing; 2) the fact that the State had offered a plea bargain at one time in which the prosecutor indicated he would not seek the death penalty if Mr. Stuart pleaded guilty, Mr. Stuart was being punished for exercising his right to a jury trial; 3) that there was new evidence indicating Mr. Stuart had discussed with others the problems with disciplining, and had non-violent relationships with children and other women. The trial court denied Mr. Stuart post-conviction relief and the Idaho Supreme Court upheld that denial. *Stuart II*, 118 Idaho at 873, 801 P.2d at 1224.

Of more immediate concern to the issues currently before this Court is *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990) (*Stuart III*). The issue before the Idaho Supreme Court in *Stuart III* was a second post-conviction

petition filed by Mr. Stuart. The second petition alleged that while incarcerated at the Clearwater County Jail awaiting trial, the Clearwater County Sheriff's Department monitored and/or recorded conversations of Mr. Stuart. Those conversations included attorney-client communications which were used by the State to gain evidence not otherwise in its possession. *Stuart III*, 118 Idaho at 933, 801 P.2d at 1284. The *Stuart III* court set forth its factual recitation as follows:

> The appellant was confined in the Clearwater County Jail for twenty-four days before an attorney was appointed to represent him. During this twenty-four day period, the appellant contacted Mr. Matson, an attorney in Seattle who had represented him before. Included in these discussions between the appellant and Mr. Matson, were the names and locations of various witnesses who were later called to testify at trial by the State.

Stuart III, 118 Idaho at 934, 801 P.2d at 1285.

The first issue dealt with in *Stuart III* was whether there could properly be a second petition for post-conviction relief. The Idaho Supreme Court held that under the circumstances (facts unknown at the time of the first petition) the second petition was timely and proper. *Stuart III*, 118 Idaho at 934, 801 P.2d at 1285.

After finding that there was an attorney/client relationship between Mr. Stuart and Mr. Matson, the Idaho Court ruled as follows:

> We begin our analysis by recognizing that an accused has the constitutional right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S.

335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amend. VI. This right is fundamental and is not a luxury. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). So fundamental is this right that it has been recognized as the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1141, 25 L.Ed.2d 763 (1970). This right to effective assistance cannot be disregarded by the states. *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

We hold that the monitoring and recording of attorney-client conversations may deny a defendant the constitutional right of effective assistance of counsel, *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963); the constitutional right to due process, *Coplon v. United States*, 191 F.2d 749 (D.D.C. 1951), *cert. denied*, 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690 (1952). *See also, Berger v. New York*, 338 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Attorney-client conversations are constitutionally protected and cannot be invaded by the State. *In re Bull* 123 F.Supp. 389 (D.Nev. 1954); *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963). A defendant and his attorney must be afforded the opportunity to discuss freely and confidentially.

The affidavits submitted by the State in response to the appellant's petition were insufficient to rebut the allegations of the appellant. There remain material issues of fact concerning the monitoring and recording of the appellant's attorney-client conversations.

Stuart III, 118 Idaho at 934-935, 801 P.2d at 1285-1286.

The ruling of *Stuart III* was a remand to the trial court with instructions to determine if there was recording of attorney-client conversations on the part of the sheriff's department and whether the appellant's constitutional rights were violated. *Stuart III*, 118 Idaho at 935, 801 P.2d at 1286. Particular note should be paid to Justice Bistline's concurring opinion in *Stuart III* wherein he stated in reference to Mr. Stuart's then attorney:

> Thus it came about at trial that Mr. Kinney had to defend Stuart on actual information charges of first degree torture murder, and at the same time defend against the non-charged crimes, including a hospital rape of one of the women witnesses, and an unrelated attempted drowning of another, all because the district judge had ruled this evidence as being necessary to prove torture murder. Now, as Paul Harvey would say, here is the rest of the story. The witnesses who Mr. Kinney could not locate, for perhaps some reason other than his lack of time and funds, and could not adequately prepare against, are now belatedly learned to be – from the mouths of conscientious citizens – the same women the whereabouts of whom had been discussed in wire-tapped conversations between Stuart and an attorney who was advising him from western Washington. The district judge in his sentencing decision said that Stuart had been found by him – just him, and not the jury – to be *guilty beyond a reasonable doubt* of whatever those women testified Stuart had done to them.

Stuart v. State, 118 Idaho at 936, 801 P.2d at 1287 (Bistline J., concurring)

The statement by the State as to the remand issue is inaccurate, (Pet. p. 4 & 5). The instructions to the trial court by the Supreme Court in *Stuart III* were to determine if there was a recording and, if so, were Mr. Stuart's constitutional rights violated, not "whether any information in those conversations was inappropriately obtained" as set forth by the State. It has been established that the State would not have become aware of several of the witnesses used by the State in order to prove Mr. Stuart's alleged intent, as well as aggravating factors in obtaining the death sentence, absent the surripitious recording and/or monitoring. *Stuart III*, 118 Idaho at 936, 801 P.2d at 1287.

Thus, finally the stage was set for the Idaho Supreme Court's opinion in *Stuart v. State*, ___ Idaho ___, 907 P.2d 783 (1995) (*Stuart IV*).

The Idaho Supreme Court in *Stuart IV* spent the majority of the decision summarizing witnesses' testimony regarding first, whether there was monitoring of the calls, then result, if any, of the destruction of certain phone logs and dispatch logs which would have indicated who had called, when the calls occurred and whether calls were "taped." *Stuart IV*, 907 P.2d at 786-789.

There is absolutely no question there is a factual finding in the record that the jail phone log book for 1981 and 1982, as well as the dispatch radio log (2 separate items) were intentionally removed from the jail and/or destroyed. Even the trial court found that pages of the jail phone log had been *deliberately* torn or cut from the jail phone log book, and had they not been destroyed, the missing pages would have documented Mr. Stuart's

phone activity. Similarly the trial court found that the missing dispatch log would have shown the activities of the dispatchers during the relevant time period (e.g. recording or monitoring). This is important because the method of monitoring was both by tape recording as well as standing in close proximity to Mr. Stuart as he was using the phone. *Stuart IV*, 907 P.2d at 790-791.

After reviewing this evidence the Idaho Supreme Court then ruled as follows:

> Therefore, because the district court found that the phone records were intentionally destroyed and the record on appeal establishes that the phone records were in the exclusive control and possession of the sheriff's office at the time this took place, the district court's finding that the destruction was not attributable to the sheriff's office must be set aside as clearly erroneous. The next step in our analysis is a determination of the constitutional significance of this erroneous factual finding. *Stuart IV*, 907 P.2d at 791-792.

The Idaho Supreme Court held that once the finding of the possession and destruction of the evidence was attributable to the State:

> . . . [b]ut for the nondisclosure of this evidence which was not material, the phone logs, evidence of unknown value, would undoubtedly have been preserved. Therefore, we must proceed to analyze whether the non-disclosure of non-material evidence has significance under the controlling standard for establishing a

> constitutional violation based on the destruction of the evidence of unknown value.

Stuart IV, 907 P.2d at 791.

The Idaho Supreme Court then held specifically in cases of destroyed evidence as follows:

> In essence, for cases where the destroyed evidence is of unknown value, the Supreme Court's decision in *Youngblood* consolidates the three considerations which were enunciated in *Paradis* through its reasoning that materiality and prejudice to the defense can be presumed where the government acts in bad faith as that term was defined by the Court in *Trombetta*. Therefore, because of the unknown value of the evidence at issue in this case we apply *Youngblood* and restrict our inquiry to the existence of governmental bad faith.

Stuart IV, 907 P.2d at 792.

The Court then held that the failure to provide discovery regarding the taped phone call is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood*. *Stuart IV*, 907 P.2d at 793.

The Court then found another basis for finding bad faith, independent from the *Youngblood* determination as follows:

> As discussed in the previous section, the district court's finding that the intentional destruction of evidence was not attributable to the state was unsupported by substantial and competent evidence. Accordingly, having reversed that finding as clearly erroneous, *such*

> *determination constitutes an independent and adequate basis apart from the discovery violation for a finding of bad faith under Youngblood.* We next proceed to analyze the consequences of this constitutional violation. (emphasis added)

Stuart IV, 907 P.2d at 793.

The Court concluded by discussion of the spoilation doctrine wherein the showing of intentional destruction of evidence by an opposing party creates an inference that the missing evidence was adverse to the party's position. *Stuart IV,* 907 P.2d at 793-794, and remanded to the trial court to weigh the evidence, giving benefit of favorable inferences concerning the destroyed evidence to Mr. Stuart.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10 of the Rules of the United States Supreme Court provides for granting a petition for a writ of certiorari only when special and important reasons exist for review. The position espoused by the State fails to satisfy any of the criteria set forth in subsection (a) through (c) of Rule 10. The Idaho Supreme Court's decision in *Stuart IV* is entirely consistent with decisions of the United States Supreme Court as well as Federal Circuit Courts of Appeal.

At best, the State takes the position the Idaho Court made erroneous factual findings or misapplied a properly stated rule of law. This is an insufficient basis for granting review.

Ordinarily, the United States Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom. Sup.Ct.R. 10(c); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1950). *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

Thus respondent respectfully requests that the Petition be denied.

II.

THE COURT HAS A DUTY TO SEARCH FOR CONSTITUTIONAL ERROR IN A CAPITAL CASE AND SHOULD NOT SUBSTITUTE SPECULATION FOR THE OPINION OF LOWER COURTS.

The State makes much of the case of *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The introduction of *Kyles* penned by Justice Souter states:

> Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting that it is in a capital case," *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987),[FN1] we granted certiorari, 511 U.S. ___, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994), and now reverse.
>
> > The dissent suggests that Burger is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. Post, at 1576-1577. We explain, infra, at 1569, that

> this is not a case of simple error correction. As for the significance of prior review, Burger cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. 483 U.S., at 785, 107 S.Ct. at 3121. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's Brady claim.

Kyles, 115 S.Ct. at 1560, n.1.

Both aspects of the above-quoted language arise in the instant case. First, it is a capital case and should require painstaking search for constitutional error, if sought by Mr. Stewart and second this Court should not interfere with the factual findings of a lower court closer in time and proximity to the record and the proceedings below.

III.

THE "REASONABLE PROBABILITY" FINDING UNDER *KYLES V. WHITLEY* IS A FACTUAL FINDING AND SHOULD NOT BE DISTURBED BY GRANTING A PETITION FOR A WRIT OF CERTIORARI.

The State argues that failure to disclose evidence favorable to defendant must be material in order to establish a reasonable probability that the result would have been different. The State argues that *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 1316 L.Ed.2d 490 (1995), stands for the proposition that "evidence not disclosed" to a defendant must be favorable to the defendant and must be material. Materiality is established by a finding there

is a reasonable probability that the result would have been different.

The State's argument is placing the cart before the horse. The case at bar deals in large part with the intentional destruction of evidence, not a negligent failure to disclose evidence or a judgment call on the part of a prosecutor. The instant case concerns intentional bad faith destruction of evidence by the State to which the Idaho Supreme Court applied the spoilation doctrine and required the trial court make further findings or inferences in favor of Mr. Stuart.

In *Kyles* this Court held:

> The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Citations omitted)

Kyles v. Whitley, 115 S.Ct., at 1565.

The above-cited language is inapplicable to the case at bar for at least three reasons. First, the holding is "irrespective of good or bad faith" which flies in the face of the first portion of the Idaho Supreme Court's ruling that there was bad faith on the part of the State. Second, application of the spoilation doctrine requires a finding of

materiality (a finding by the Idaho Supreme Court under state law is inappropriate for review by the U.S. Supreme Court). Sup.Ct.R. 10; Third, the Idaho Supreme Court found discovery violations in and of itself required application of the spoilation doctrine. *Stuart IV*, 907 P.2d at 793.

The State wants this Court to believe that the error was one of law when, in fact, there was no error. The State merely doesn't like the factual findings of the Idaho courts. This is made all the more evident in an obvious attempt by the State to color legal analysis with gruesome facts by insertion in bold, capitalized letters that had the phone logs been preserved, Stuart would not have been convicted for the "torture murder of a three-year-old boy."

IV.

THE QUESTION OF MATERIALITY IS A FACTUAL DETERMINATION INAPPROPRIATE FOR THE GRANTING OF A WRIT OF CERTIORARI

Brady v. Maryland stands for the proposition that the evidence maybe "material" to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, L.Ed.2d 215 (1963). *Kyles v. Whitley* requires evidence be material. However, the finding of materiality does not require that Mr. Stuart prove by a *preponderance* the disclosure of the suppressed evidence would result in an acquittal or a different sentence, but only that there is a *reasonable probability* of a different result. In citing *Bagley*, the *Kyles* court stated as follows:

> *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 115 S.Ct. at 1566.

Again, in the instant case the findings of the Idaho courts on materiality are factual. The State is not arguing the Idaho Supreme Court misstated the law. The state is arguing a misapplication of facts to properly stated law. Mr. Stuart, however, argues a proper application. Regardless, the result is the same. The petition should be denied.

The holding of the Idaho Supreme Court in *Stuart IV*, contrary to allegations by the State, was not that a *single* piece of missing evidence was material, but that the missing evidence (which in fact was two items – the jail logs and the dispatch logs) would have led to favorable evidence and/or led the State to evidence which it would not otherwise have (Pet. p. 9). The *Stuart III* Court's instruction to the trial court was to make a favorable inference to Mr. Stuart but left to the trial court the determination as to the appropriate weight, thus the effect of that determination has yet been made. Thus the State invites this Court to embark upon a review of facts

not only found, but yet to be found, by a State lower court.

V.

DUE TO THE INTENTIONAL DESTRUCTION OF EVIDENCE IT IS IMPOSSIBLE TO DETERMINE THE MATERIALITY OF EVIDENCE.

The State claims that missing phone logs are in and of themselves the evidence. (Pet. p. 9). The logs or the conversations in and of themselves that were recorded or listened to are not the problem. It is evidence that was gleaned as a result of the surreptitious monitoring of phone conversations and/or personal conversations between Mr. Stuart and his attorneys that is the problem. The State failed to address that issue in its petition.

The State had the logs in its possession. Without question the dispatch logs and jail log were intentionally destroyed by the State, which in turn leads to an inference that those logs contained evidence favorable to Mr. Stuart. The "effect" of that favorable inference has yet to be made and cannot be assumed by this court.

Again, there were two grounds found by the *Stuart IV* court for sending this matter back to the trial court. The first was for a discovery violation which apparently is not at issue in this matter since it is not raised by the State. The second is the finding of *Youngblood* bad faith.

VI.

THE STATE ERRONEOUSLY CLAIMS THAT THE IDAHO COURT FAILED TO PROPERLY APPLY *ARIZONA V. YOUNGBLOOD* AND *CALIFORNIA V. TROMBETTA*.

The holding of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 337, 102 L.Ed. at 281 (1988), requires a showing of bad faith on the part of the police in the context of a failure to preserve potentially useful evidence:

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Arizona v. Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337, 102 L.Ed.2d at ___.

The Idaho Supreme Court has made a factual finding of bad faith. Therefore the failure to preserve potentially useful evidence does constitute a denial of due process of law particularly when that failure is the result of an intentional destruction of that evidence. This is not a situation where the entire phone log was destroyed as a part of a general or usual course of operations. This is a situation where specific pages covering the times that Mr. Stuart was incarcerated were torn from books and destroyed while these books were in the possession of the sheriff's office. These documents also apparently were not destroyed *until* the issue of the surreptitious monitoring of attorney-client communications was discovered. Therefore, the Idaho Supreme Court made the finding the destruction was in bad faith and applied the spoilation doctrine which simply required a ruling that a favorable inference to Mr. Stuart be made and a direction to the

trial court to determine what weight to give that inference. *Stuart IV*, 907 P.2 at 794.

Once again, the State is inviting this Court to embark upon a long and torturous review of determinations and evidence factual, one better left to the courts more closely associated with those facts. The State fails to make the distinction between the logs and the evidence obtained as a result of the monitored conversations. (Pet. p. 15) The logs in a vacuum mean absolutely nothing. The logs were evidence of who Mr. Stuart was talking to, when he was talking to them, and whether, in fact, those conversations had been monitored. The State had that information in its possession and that very specific information was destroyed by the State. There was no proximate causation argument or finding required to reach the bad faith conclusion.

VII.

THE IDAHO COURT PROPERLY STATED THE LAW AND PROPERLY APPLIED FACTS TO THAT LAW.

The State makes much of the alleged failure of the Idaho Supreme Court to deal with a district court opinion from the United States District Court of Delaware. (Pet. p. 16) In *United States v. Gonzalez*, 907 F.Supp. 785, 792 (D. Del. 1995) the court stated as follows:

> Defendant's burden to prove a denial of due process arising out of the government's failure to preserve potentially useful evidence is two-fold. First, defendant must prove that the exculpatory value of the item destroyed was apparent before its destruction, and was of such a nature

that defendant would be unable to obtain comparable evidence from other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). Second, defendant must prove that the government's failure to preserve evidence constitutes bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988) (failure to refrigerate clothing and perform certain tests on fluids found thereon was deemed to be at worst negligent, and did not demonstrate the requisite mental state necessary to make out a due process claim). These burdens are interrelated: bad faith is proved by showing that the evidence had exculpatory value apparent to the police, but was nonetheless destroyed. See *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993).

The holding in *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) stated as follows:

> Two Supreme Court cases set out the test we apply to determine when the government's failure to preserve evidence rises to the level of a due process violation. In *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984), the Court held that the government violates the defendant's right to due process if the unavailable evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." In *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988), the Court added the additional requirement that the defendant demonstrate that the police acted

> in bad faith in failing to preserve the potentially useful evidence. See also Paradis 954 F.2d at 1488 (explaining Trombetta and Youngblood test).
>
> Youngblood's bad faith requirement dovetails with the first part of the Trombetta test: that the exculpatory value of the evidence be apparent before its destruction. *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood*, 488 U.S. at 56-57 n.*, 109 S.Ct. at 336-337 n*.

Quite simply, the Idaho Supreme Court did exactly what the federal court in *Cooper* did. Again, at the risk of sounding like a broken record, the State is inviting this Court to reverse the state Supreme Court based upon factual findings and not the erroneous statement of the law. Therefore, the petition should be denied.

CONCLUSION

For the reason set forth above, the Petition for Writ of Certiorari to review the decision of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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